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EDITOR'S NOTE

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PROCEEDINGS AND ORDERS DATE: 1023

CASE NBR: 86-1-00158 CFX
SHORT TITLE: Wayne, et al.
VERSUS: Carroll, Timothy

DOCKETED: Jul 30 198

Date	Proceedings and Orders
Jul 30 1986	Petition for writ of certiorari filed.
Sep 3 1986	Order extending time to file response to petition until September 24, 1986.
Sep 24 1986	DISTRIBUTED. October 10, 1986
Sep 24 1986	Brief of respondent Timothy Carroll in opposition filed.
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Oct 20 1986	Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

PETITION FOR WRIT OF CERTIORARI

86-158

No. _____

In The

Supreme Court of the United States

October Term, 1986

COUNTY OF WAYNE, WAYNE COUNTY SHERIFF, and WAYNE COUNTY JAIL ADMINISTRATOR,

Petitioners,

vs.

TIMOTHY CARROLL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. FOLLOWING THIS COURT'S CHARACTERIZATION IN *WILSON v. GARCIA, DANIELS v. WILLIAMS,* AND *DAVIDSON v. CANNON* OF A 42 U.S.C. § 1983 ACTION AS ONE FOR THE DELIBERATE OR INTENTIONAL INFLICTION OF INJURY TO THE PERSON, IS NOT THE MOST ANALOGOUS STATE PERIOD OF LIMITATION APPLICABLE TO SUCH AN ACTION THAT PERIOD PRESCRIBED FOR THE INTENTIONAL INFLICTION OF PERSONAL INJURY?

2. DOES *BRANDON v. HOLT* COMPEL IMPOSING 42 U.S.C. § 1983 LIABILITY ON A MICHIGAN COUNTY FOR THE OFFICIAL ACTS OF ITS ELECTED SHERIFF, NOTWITHSTANDING THAT UNDER STATE LAW THERE IS NO AGENCY-LIKE RELATIONSHIP BETWEEN THE COUNTY AND THE SHERIFF AND THAT THE UNITED STATES CONGRESS APPROVED MICHIGAN COUNTIES' IMMUNITY UNDER THE MICHIGAN CONSTITUTION TO LIABILITY FOR THOSE ACTS?

LIST OF PARTIES

The parties to this action in the Court of Appeals were the respondent Timothy Carroll and the petitioners County of Wayne; the Wayne County Sheriff, who at the time this action was brought was William Lucas, sued only in his official capacity as Wayne County Sheriff; and the Wayne County Jail Administrator, who at the time this action commenced was Frank Wilkerson, sued only in his official capacity as Wayne County Jail Administrator. The other parties defendant in this action before the United States District Court for the Eastern District of Michigan were not parties on the appeal in the Sixth Circuit Court of Appeals.

Petitioner County of Wayne is incorporated as a charter county under the laws of the State of Michigan, and has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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No. _____

In The

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vs.

TIMOTHY CARROLL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, through counsel JOHN D. O'HAIR, Wayne County Corporation Counsel, and GLEN HOWARD DOWNS, Assistant Wayne County Corporation Counsel, respectfully pray this Court will issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this action on January 23, 1986, as amended by its Order entered March 12, 1986.

OPINIONS AND ORDERS BELOW

The initial panel opinion by the United States Court of Appeals for the Sixth Circuit that issued on January 23, 1986, as later amended, is reported as *Carroll* v. *Wilkerson*, 782 F.2d 44 (6th Cir. 1986) and is reproduced as this Petition's Appendix "A", at App. 1 through 3.

The Court of Appeal's Order entered March 12, 1986, amending the initial panel opinion, is reprinted as this Petition's Appendix "B", at App. 4.

The several Opinions and Orders entered in the United States District Court for the Eastern District of Michigan, Southern Division, are unpublished and reprinted as Appendices "C" through "I" to this Petition, at App. 5 through 26.

The Court of Appeals Order entered May 2, 1986, denying Petitioners' petition for rehearing en banc also is unpublished and is reprinted as this Petition's Appendix "J", at App. 27.

STATEMENT OF JURISDICTION

The Respondent brought this action in the United States District Court for the Eastern District of Michigan, Southern Division, invoking federal jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343. On March 26, 1983, the district court entered final judgment in favor of all defendants, and Respondent appealed.

On January 23, 1986, the Sixth Circuit Court of Appeals entered its judgment and opinion reversing the district court's judgment and remanding the action for further proceedings. After Petitioners filed a Petition for Rehearing and Suggestion for Rehearing En Banc, the Court of Appeals amended its opinion but entered its order on May 2, 1986, denying the petition for rehearing.

The jurisdiction of this Court to review the Court of Appeals judgment as amended is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Mich. Const. art. VII, § 4 (1835) provided in its entirety:

> "There shall be a sheriff, a county treasurer, and one or more coroners, a register of deeds and a county surveyor, chosen by the electors in each of the several counties once in every two years, and as often as vacancies shall happen. The sheriff shall hold no other office, and shall not be capable of holding the office of sheriff longer than four in any term of six years; he may be required by law to renew his security from time to time, and in default of giving such security, his office shall be deemed vacant; but *the county shall never be made responsible for the acts of the sheriff*." [emphasis added]

Mich. Const. art. VII, § 4 (1963) now provides in its entirety:

> "There shall be elected for four-year terms in each organized county a sheriff, a county clerk, a county treasurer, a register of deeds and a prosecuting attorney, whose duties and powers shall be provided by law. The board of supervisors in any county

may combine the offices of county clerk and register of deeds in one office or separate the same at pleasure."

Mich. Const. art. VII, § 6 (1963) now provides in its entirety:

> "The sheriff may be required by law to renew his security periodically and in default of giving such security, his office shall be vacant. *The county shall never be responsible for his acts*, except that the board of supervisors may protect him against claims by prisoners for unintentional injuries received while in his custody. He shall not hold any other office except in civil defense." [emphasis added]

Three federal statutes are in this Petition, the first being in the act that admitted the state of Michigan into the Union, Act of June 15, 1836, 5 Stat. 49, § 2. The statutory section is too long to set out here, and is reprinted as Appendix "K" to this Petition, at App. 28-29.

The second statute is the federal Rules of Decision Act. 28 U.S.C. § 1652:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

The third statute is 42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

There are also two statutes of the State of Michigan, the first being Mich. Comp. Laws § 600.5805 (1979) which prescribes periods of limitation for actions for injuries to persons or property:

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
>
> (2) The period of limitations is 2 years for an action charging assault, battery, or false imprisonment.
>
> (3) The period of limitations is 2 years for an action charging malicious prosecution.
>
> (4) The period of limitations is 2 years for an action charging malpractice.
>
> (5) The period of limitations is 2 years for an action against a sheriff charging misconduct or neglect of office by the sheriff or the sheriff's deputies.
>
> (6) The period of limitations is 2 years after the expiration of the year for which a constable was elected for actions based on the constable's negligence or misconduct as constable.
>
> (7) The period of limitations is 1 year for an action charging libel or slander.
>
> (8) The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

(9) The period of limitations is 3 years for a products liability action. However, in the case of a product which has been in use for not less than 10 years, the plaintiff, in proving a prima facie case, shall be required to do so without benefit of any presumption.

The second Michigan statute is Mich. Comp. Laws § 51.75 (1979), in the act prescribing the powers and duties of Michigan county sheriffs:

"The sheriff shall have the charge and custody of the jails of his county, and of the prisoners in the same; and shall keep them himself, or by his deputy or jailer."

STATEMENT OF THE CASE

Respondent Carroll commenced this action on October 28, 1982, in the United States District Court for the Eastern District of Michigan against Petitioners and other county and state corrections officials (whose dismissals Respondent did not appeal) under 42 U.S.C. § 1983 and 28 U.S.C. § 1343, alleging in substance that on October 30, 1979, while being detained in the Wayne County jail for having violated the terms of his probation, he was assaulted and sodomized by two other jail inmates. Respondent predicated his federal claims against Petitioners on violations of the eighth and fourteenth amendments to the United States Constitution.

Frank Wilkerson and, later, William Lucas, who then were the Wayne County Jail Administrator and the Wayne County Sheriff, respectively, moved for dismissal on the ground Respondent's § 1983 claims were time-barred by the two-year period of limitation in either Mich. Comp.

Laws §§ 600.5805(2) or (5). Appendix "C", at App. 6; Appendix "E", at App. 11). In opinions entered June 14, 1983, and November 22, 1983, respectively (see Appendices "C" and "E"), the district court held Mich. Comp. Laws § 600.5805(5) (pertaining to misconduct of sheriffs in office) to prescribe the period of limitation for the most closely analagous state action, which at that time was the criterion established by this Court in *Board of Regents* v. *Tomanio*, 446 U.S. 478, 483-484, 100 S.Ct. 1790, 1794-1795, 64 L.Ed.2d 440 (1980) and by the Sixth Circuit in *Kilgore* v. *City of Mansfield, Ohio*, 679 F.2d 632, 634 (1982) for determining which state period of limitation controlled in a given § 1983 action. Accordingly, the district court granted the motions to dismiss (Appendices "D" and "F" *infra*).

The district court also later granted Petitioner County of Wayne's motion for summary judgment under Fed. R. Civ.P.56(b), upon the ground *inter alia* that *under Michigan law* county jails as well as the prisoners therein are entrusted exclusively to county sheriffs who are independent of county control in that respect, and that Respondent therefore had failed to implicate any County of Wayne "policy or custom" under *Monell* v. *Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The district court's opinion on the motion for summary judgment is set out as Appendix "G" to this Petition.

The Court of Appeals reversed all three rulings. On the period of limitation issue, the Court of Appeals pointed out that "[t]here have been several significant decisions by the Supreme Court of the United States and by this court since the district court entered its orders in

this case" (Opinion at Appendix "A", at App. 2), and then concluded: "If the district court had had the benefit of the decisions in *Wilson* v. *Garcia* [——U.S.——, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985)] and *Mulligan* v. *Hazard* [777 F.2d 340 (6th Cir. 1985)] it would have been compelled to conclude that the present section 1983 action was subject to the three-year statute of limitations for personal injury claims set forth in MCLA § 600.5805(8)". (Opinion at Appendix "A", at App. 2). In reversing the summary judgment in favor of the County of Wayne, the Court of Appeals followed its earlier decision in *Marchese* v. *Lucas*, 758 F.2d 181, 188-189 (6th Cir. 1985) *petition for cert. filed sub nom. County of Wayne* v. *Marchese*, 54 U.S.L.W. 3153 (U.S. Aug. 29, 1985) (No. 85-359), in which "this court held Wayne County liable for the acts of the county sheriff in a section 1983 action alleging mistreatment of a prisoner in the county jail," (Opinion at Appendix "A", at App. 3) and held further that that holding "is consistent with and indeed compelled by the U.S. Supreme Court's decision in *Brandon* v. *Holt* [——U.S.——, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985)]". *Marchese v. Lucas*, 758 F.2d at 189.

REASONS FOR ALLOWING THE WRIT

Justices White and Marshall, dissenting from this Court's order denying the petition for certiorari in *Mulligan* v. *Hazard*, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 54 U.S.L.W. 3808 (U.S. June 9, 1986) (No. 85-1641) recapitulated the widespread and recurrent conflict among the courts of appeals following *Wilson* v. *Garcia*, ——U.S.——, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) when, directed by *Wilson* to use in § 1983 actions the state period of limitation applicable to personal injury actions, the lower courts discover that in some states (like Michigan) there is more than one state period of limitation applicable to such actions. Some circuits have chosen the residual period of limitation applicable to undenominated personal injury actions; other have selected the period of limitation governing intentional torts.

With its decision in the present case, the Sixth Circuit has now chosen *both* - the *residual* three-year period of limitation in Mich. Comp. Laws §600.5805(8) for § 1983 actions arising in Michigan, and earlier, in *Mulligan* v. *Hazard,* the one-year period prescribed in Ohio for actions for *intentional torts.* Thus, the Sixth Circuit is not only involved in the already considerable and growing conflict and confusion over which state period of limitation is most appropriate for § 1983 actions when a state has prescribed more than one for personal injury actions; it has fostered that conflict and confusion within its own circuit by refusing in the present case to follow its own precedent in *Mulligan* v. *Hazard* and then refusing to resolve the conflicting panel decisions.

Moreover, inasmuch as this Court has exercised the federal prerogative to "[characterize] § 1983 for statute of limitations purposes", *Wilson* v. *Garcia*, 105 S.Ct. at 1941, and has characterized the claims properly brought under the statute as "analogous to tort claims for personal injury", *id.* at 1948, arising from the intentional or at least "deliberate", e.g., *Daniels* v. *Williams,* ——U.S.——, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986), "[abuse of] governmental power, or [its employment] as an instrument of oppression", *Davidson* v. *Cannon,* ——U.S.——, 106 S.Ct.

668, 670, 88 L.Ed.2d 677 (1986), the Court of Appeal's repudiation of Michigan's two-year period of limitation applicable to the most closely analogous state actions is contrary to *Wilson* v. *Garcia,* 105 S.Ct. at 1943, holding that "the *length* of the limitations period * * * [is] to be governed by *state* law" (emphasis added), thus according due deference to "the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action." *Id.* at 1945.

In reversing the summary judgment in favor of Petitioner County of Wayne by holding the County accountable for the acts of the county sheriff, the Court of Appeals compounded its earlier error in *Marchese* v. *Lucas,* in which a petition for a writ of certiorari is now pending before this Court, i.e.: The Court of Appeals, misreading *Brandon* v. *Holt,* ——U.S.——, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985) to impose upon county government liability for the policies of non-county officials over whom the county has no control, (1) usurped as a federal question the State of Michigan's prerogative to fix the distribution of local policy-making powers among its counties and local sheriffs, contrary to the principles of federalism this Court most recently affirmed in *Pembaur* v. *City of Cincinnati,* ——U.S.——, 106 S.Ct. 1292, 1296, 1301, 89 L.Ed.2d 452 (1986), and which have been settled at least since this Court's decisions in *Forsyth* v. *City of Hammond,* 166 U.S. 506, 17 S.Ct. 665, 41 L.Ed. 1095 (1897) and *Highland Farms Dairy* v. *Agnew,* 300 U.S. 608, 57 S.Ct. 549, 81 L.Ed. 835 (1937), among others; and then (2) fashioned a new county liability for the policies of county sheriffs, in conflict with decisions in both the Fourth and Fifth

Judicial Circuits on the issue, see: *Allen* v. *Fidelity & Deposit Co. of Maryland,* 515 F.Supp. 1185, 1189-1191 (D.S.C. 1981) *aff'd mem.* 694 F.2d 716 (4th Cir. 1982); *Rhode* v. *Denson,* 776 F.2d 107, 110 (5th Cir. 1985) *cert. denied sub nom. Rhode* v. *San Jacinto County,* 54 U.S.L.W. 3809 (U.S. Jun. 9, 1986) (No. 85-1667) and contrary to both the express provision in the Constitution of the State of Michigan precluding that liability and to the pertinent decisions of the Michigan Supreme Court. See: Mich. Const. art. VII, § 6 (1963) and *Lockaby* v. *County of Wayne,* 406 Mich. 65, 77, 276 N.W.2d 1, 3 (1979), respectively.

The Petitioners respectfully suggest, based on the foregoing, that in this action the Sixth Circuit Court of Appeals "has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; * * * [and] has decided a federal question in a way in conflict with applicable decisions of this Court." Sup. Ct. R. 17.1(a) & (c). Further, the Court of Appeals' decision ascribing the Petitioner Sheriff's policy-making powers to Petitioner County of Wayne conflicts with the applicable state laws and decisions in Michigan, and is reviewable by this Court under the principles affirmed in *West* v. *American Telephone & Telegraph Co.,* 311 U.S. 223, 61 S.Ct. 179, 85 L.Ed. 139 (1940).

I.

IN VIEW OF THIS COURT HAVING ALREADY LIKENED § 1983 ACTIONS TO THOSE FOR THE INTENTIONAL OR DELIBERATE INFLICTION OF INJURY TO THE PERSON, THE STATE PERIOD OF LIMITATION THAT BEST COMPLEMENTS THOSE ACTIONS THUS CHARACTERIZED IS THE PERIOD PRESCRIBED FOR INTENTIONAL INJURIES TO THE PERSON—NOT RESIDUAL OR "CATCH-ALL" PERIODS OF LIMITATION APPLICABLE TO COMMON NEGLIGENCE ACTIONS AND TO ACTIONS FOR PROPERTY DAMAGE.

In *Wilson* v. *Garcia*, — U.S. —, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), this Court exercised its prerogative, as a matter of federal law, to characterize § 1983 actions for period of limitation purposes as "tort action[s] for the recovery of damages for personal injuries", *Wilson* v. *Garcia*, 105 S.Ct. at 1947, reserving to the States the prerogative to determine as a matter of state law "the length of the limitations period" for § 1983 actions thus characterized. *Id.* 105 S.Ct. at 1943. The analogy to personal injury tort actions was chosen because "[t]he atrocities that concerned Congress in 1871 [when § 1983 was enacted] plainly sounded in tort", *Id.* at 1948, and accordingly "Congress unquestionably would have considered the remedies established in the Civil Rights Act to be more analogous to tort claims for personal injury than, for example, to claims for damages to property or breach of contract." *Id.*

This Court's characterization of § 1983 actions in *Wilson* v. *Garcia* was further amplified in *Daniels* v. *Williams*, ——U.S.——, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986), when again harking back to the historical context

of § 1983's enactment, this Court held the statute to remedy only "deliberate" deprivations of constitutional rights.

Thus, the composite characterization of a § 1983 action (for period of limitation purposes) resulting from *Wilson* v. *Garcia* and *Daniels* v. *Williams* is that of a civil action for the intentional or deliberate infliction of injury to the person. It only remains to identify the appropriate state period of limitation that would apply to an action thus characterized.

Without discussion, the Court of Appeals in this case selected the three-year period in Mich. Comp. Laws § 600. 5805 (8), the residual or "catch-all" provision "*for all other actions* to recover damages for the death of a person, or for injury to a person or property." (emphasis added) With all respect, the choice does not comport with the federal characterization of § 1983 actions in *Wilson* v. *Garcia* and *Daniels* v. *Williams*, nor does the choice comport with the Court of Appeal's own earlier decision in *Mulligan* v. *Hazard*, 777 F.2d 340 (6th Cir. 1985).

We have already touched on this Court's characterization of § 1983 actions and its rejection of other state civil action analogues. The Court of Appeals panel in *Mulligan* v. *Hazard* followed this Court's directive in the latter respect, see 777 F.2d at 343 ("the Court rejected the use of other arguably analogous statutes of limitations, such as those for * * * tort claims for damages to property * * * or the states' catch-all period of limitations") and then, consistent with this Court's characterization of § 1983 actions in *Wilson* v. *Garcia* (and later *Daniels* v. *Williams*) held:

> "The concern of Congress, thus, was with perpetrators of *intentional tortious conduct. While both* Sections 2305.10 and 2305.11 [i.e. the provisions of the Ohio Revised Code prescribing, respectively, a two-year

period of limitation for an "action to recover for bodily injury", and a one-year period for actions for "libel, slander, assault, battery, malicious prosecution, false imprisonment or malpractice", 777 F.2d at 343] *theoretically encompass intentional tort actions, Section 2305.11* • • • *more specifically encompasses the sorts of actions which concerned Congress* as it enacted the civil rights statutes."
[emphasis added]

The Court of Appeals' choice of Mich. Comp. Laws § 600.5805 (8) was hardly "compelled", 782 F.2d at 45, by *Garcia* and *Mulligan*. On the contrary, those cases *condemn* that choice. First of all, the statute plainly encompasses both intentional torts and simple negligence with the latter clearly being nonactionable under § 1983 following this Court's decisions in *Daniels* v. *Williams*, and *Davidson* v. *Cannon*. Secondly, the subsection chosen by the Court of Appeals applies to actions "for injury to • • • property", again a possible state analogue to § 1983 actions that both this Court in *Wilson* v. *Garcia* and the Sixth Circuit panel in *Mulligan* v. *Hazard* expressly rejected. And third, it is a "catch-all" provision, of the kind *both* courts again rejected in favor of one more specifically encompassing the intentional injuries to persons that § 1983 was enacted to redress.

We respectfully suggest the correct choice in this case - and in states like Michigan where there is more than one *statute* prescribing periods of limitation for personal injury actions - is the *period* of limitation applicable to intentional torts most closely analogous to this Court's characterization of § 1983 actions. Michigan has *two statutes* prescribing a period of limitation for such actions - Mich. Comp. Laws §§ 600.5805 (2) (pertaining to assault, battery, and false imprisonment) and (3) (pertaining to malicious prosecution). But Michigan, like many states, prescribes

only one period of limitation for all of those actions - two years. It is, after all, the *period* of limitation that represents "the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action", *Wilson* v. *Garcia*, 105 S.Ct. at 1945. In Michigan, that period is two years.

II.

BRANDON v. HOLT DOES NOT COMPEL THE LIABILITY OF A MICHIGAN COUNTY SHERIFF TO BE IMPOSED ON THE COUNTY HE SERVES, AND THE COURT OF APPEALS' JUDGMENT DOING SO VIOLATES THIS COURT'S PRECEPTS OF FEDERALISM AS WELL AS THE CONGRESSIONALLY APPROVED GRANT OF COUNTY IMMUNITY TO THAT LIABILITY IN THE MICHIGAN CONSTITUTION.

As recently as *Pembauer* v. *City of Cincinnati*, 106 S.Ct. at 1298, this Court reaffirmed that "recovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality' — that is, acts which the municipality has officially sanctioned or ordered." However, in reversing the summary judgment in favor of the County of Wayne, the Court of Appeals points to nothing the County of Wayne ever did. Rather, the Court of Appeals merely follows its earlier views in *Marchese* v. *Lucas* that the official policies and conduct of the Wayne County Sheriff may be foisted onto the County because the relationship between the two is "so close". 758 F.2d at 189. Here, as in *Marchese*, the Court of Appeals considers the County's liability for the sheriff's acts to be "consistent with and indeed compelled by the U.S. Supreme Court's decision in *Brandon* v. *Holt*, [— U.S. —, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985)]". *Marchese*, 758 F.2d at 189. So here,

as in *Marchese*, the Court of Appeals doubly erred: it misapprehended or ignored the relation between the County and the Sheriff as set by *state* law, and then misapplied *Brandon* v. *Holt*.

As for *Brandon* v. *Holt*: This Court held (so far as pertinent here) that "a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents provided, of course, the public entity received notice and an opportunity to respond." *Id.*, 105 S.Ct. 878. As this Court explained, *Id.* at 876, the rationale for the rule is that an action against a municipal official in his official capacity is "tantamount" to bring the action against the municipality itself in that "official capacity suits generally represent an action against an entity of which an officer is an *agent* • • • •" (emphasis added). *Id.* at 877 *quoting Monell v. Department of Social Services*, 436 U.S. at 690 n. 55.

That is not the relationship between the County of Wayne and the Sheriff. Notwithstanding *Marchese's* characterization of that relationship as "close", this Court has long held that federal courts have no authority to fix the powers and relationships of state-created governmental entities. *Forsyth* v. *City of Hammond*, 166 U.S. 506, 17 S.Ct. 665, 41 L.Ed. 1095 (1897); *Highland Farms Dairy* v. *Agnew*, 300 U.S. 608, 57 S.Ct. 549, 81 L.Ed. 835 (1937). This Court in *Forsyth*, quoting *Claiborne Co.* v. *Brooks*, 111 U.S. 400, 4 S.Ct. 489, 28 L.Ed. 470 (1884), explained that:

> "It is undoubtedly a question of local policy with each state what shall be the extent and character of the powers which its various political and municipal organizations shall possess, and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States,

> for it is a question that relates to the internal constitution of the body politic of the state."

Forsyth, supra, 166 U.S. at 519. Likewise, the *Highland Farms* majority held that, "How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." *Id.* 300 U.S. at 612. The same precept is embodied in the federal Rules of Decision Act, 28 U.S.C. § 1652, set out earlier, and was reaffirmed by this Court as recently as *Pembaur* v. *City of Cincinnati*, 106 S.Ct. at 1296 & 1301, when it settled the relationship among the County Sheriff, County Prosecutor, and Hamilton County, Ohio, by an "examination of Ohio Law". Accordingly, the Court of Appeals was bound to defer to state law in determining the relationship between Petitioners and in ascertaining their respective powers and liabilities.

The law in Michigan is clear that a county sheriff is not a county official in the sense of being an instrumentality of county governmental power. Just as this Court ordinarily defers to the interpretation and application of state law by the courts of appeals, *Pembaur* v. *City of Cincinnati*, 106 S.Ct. at 1301 n 13, the Court of Appeals also professes to accord like deference to the federal district courts "if a federal district judge has reached a permissible conclusion upon a question of local law". *Martin* v. *Joseph Harris Co., Inc.*, 767 F.2d 296, 299 (6th Cir. 1985). Had the Court of Appeals done so here, it would have noted the following assessment by the district court judge of the relationship between the County and the Sheriff, (Appendix "G", at App. 16-17):

> "Suffice it to say in the State of Michigan, under the 1963 Constitution, the state preserved some historical relationships that existed between county units of the Government and various elected county officials. Al-

though there was considerable pressure exercised by academic students of Government at least to put the sheriff under the direction of the county and to provide indeed a county executive — which was later done — the forces that fought for the independence of the office of sheriff prevailed and the office of sheriff was not only left separate and apart from being under the wing of County Government in general or, rather, under the control of County Government in general, but a variety of Michigan statutes — some of them ancient and some of them not so ancient — preserve and protect a number of sheriff's prerogatives which have existed since time immemorial in the State of Michigan. Under the laws of the State of Michigan, the sheriff has the responsibility for the running and operation on a day-to-day basis of the county jail, and is the primary person responsible for the care and safety of the inmates housed therein.[1]

However, instead of giving due weight to the interpretation of purely local law by Michigan federal district judges of long experience, the Court of Appeals ignores them to pursue its own view of Michigan law that neither comports with basic precepts of federalism nor furthers the avowed purposes of § 1983.

The relations between counties and sheriffs in Michigan which the district court judge in this action summarized springs from county sheriffs holding a distinct constitutional office provided for in Mich. Const. art. VII, § 4 (1963). The sheriff's duties and powers are not prescribed by the county, but by state statute—which sets them out in

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[1]See, e.g., Mich. Comp. Laws § 51.75 (1979):

> "The sheriff shall have the charge and custody of the jails of his county, and of the prisoners in the same; and shall keep them himself, or by his deputy or jailer."

The substance of this statute dates back to 1857.

considerable detail. 1975-1976 Mich. Att'y. Gen. Biennial Rep. 369; *Capitol City Lodge No. 141* v. *Meridian Township*, 90 Mich. App. 533, 541, 282 N.W.2d 383 (1979). The sheriff's independence from county control accords with the relationship between county sheriffs and their respective counties that the Michigan Constitution intended to effect:

> "As to the so-called constitutional officers, *they do not in any important respect carry out policy developed within the county.* Their duties are determined by the state legislature and their time is almost completely devoted to carrying out those statutory duties. Not only so, but they are supervised by the state in those activities. The sheriff and the prosecuting attorney, as law enforcement officers, are under the direction and supervision of the Attorney General and of the Governor himself. * * *"
> [emphasis added]

1 Official Record, *State of Michigan Constitutional Convention 1961, p. 1092* (remarks of Arthur Elliott).

In view of the mutual independence in Michigan of county sheriff's and the counties they serve, it is settled in Michigan that a county has no power to interfere with the sheriff's statutory authority, *see:* 1977-1978 Mich. Att'y. Gen. Biennial Rep. 427, 428; or make "policy in police matters" as the Court of Appeals held in *Marchese*, 758 F.2d at 188-189, or even organize a county police force, 1977-1978 Biennal Rep. *supra*. Accordingly, Michigan federal district courts conclude that given the relationship between sheriff and counties, " 'the sheriff, not the county, establishes the policies and customs described in *Monell*'." *Lopez* v. *Ruhl*, 584 F. Supp. 639, 649 (W.D. Mich 1984) *quoting in part Kroes* v. *Smith*, 540 F. Supp. 1295, 1298 (E.D. Mich. 1982). The rule in *Lopez* and *Kroes* is like that

in other federal judicial circuits — notably the Fourth, see: *Allen* v. *Fidelity & Deposit Co. of Maryland*, 515 F. Supp. 1185, 1189-1191 (D.S.C. 1981) *aff'd mem.* 694 F.2d 716 (4th Cir. 1982); *Miller* v. *Anderson*, 594 F. Supp. 640. 643 (N.D. W.Va. 1984), and the Fifth, see: *Rhode* v. *Denson*, 776 F.2d 107, 110 (5th Cir. 1985) *cert. denied sub nom. Rhode* v. *San Jacinto County*, 54 U.S.L.W. 3809 (U.S. June 9, 1986) (No. 85-1667), that where the county has no power to control its elected county sheriff, the county is not liable on the sheriff's "policies or customs" that violate constitutional rights. Observance of the relationship established by Michigan law between Michigan counties and their respective sheriffs would, under the principles of federalism just reviewed, preclude imposing liability on Petitioner County of Wayne for its sheriff's "policy or customs" in operating the Wayne County Jail. *Brandon* v. *Holt* does not nullify those principles of federalism, and so compels no different result.

Not only does the County's and the Sheriff's independence immunize the former to liability for the policies of the latter, that immunity was expressly approved by Congress upon Michigan's admission to the Union in 1836, and has been in the Michigan Constitution ever since. The provision in Mich. Const. art. VII, § 4 (1835) that "the county shall never be made responsible for the acts of the sheriff" was set out earlier, and the Congressional act approving that immunity provision, *see* Act of June 15, 1836, 5 Stat. 49, § 2, is set out as Appendix "K". That immunity provision *still* is in the Michigan Constitution. See Mich. Const. art. VII, § 6 (1963). also set out earlier. The Petitioners respectfully suggest that inasmuch as the County's state constitutional immunity to liability incurred by its Sheriff bears the imprimatur of Congress, it is of equal dignity with 42 U.S.C. § 1983, the statute upon which the Sheriff's liability is predicated. The Petitioner County of Wayne should be accorded the immunity that the constitution, with Congressional approval, granted it.

CONCLUSION

For the reasons stated, the Petitioners respectfully request this Court to issue its writ of certiorari to the United States Court of Appeals for the Sixth Circuit and thereupon reverse the judgment entered herein.

Respectfully submitted,

JOHN D. O'HAIR
Wayne County Corporation Counsel

BY: /s/ GLEN HOWARD DOWNS (P 36540)
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701 City-County Building
Detroit, Michigan 48226
Phone: (313) 224-5030

Counsel for Petitioners

DATED: July 30, 1986

APPENDIX "A"

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 84-1291, 84-1292

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIMOTHY CARROLL,

Plaintiff-Appellant,

v.

FRANK WILKERSON and WILLIAM LUCAS (84-1291),

COUNTY OF WAYNE (84-1292),

Defendants-Appellees,

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed January 23, 1986

Before: LIVELY, Chief Judge; WELLFORD, Circuit Judge; and PORTER, District Judge*.

PER CURIAM. The plaintiff, who claimed to have been assaulted and raped by other inmates while in the Wayne County Jail for violating probation, brought this action pursuant to 42 U.S.C. § 1983 against the Wayne County sheriff and the administrator of the Wayne County Jail, and against the County. The district court

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*The Honorable David S. Porter, Senior Judge, United States District Court for the Southern District of Ohio, sitting by designation.

dismissed the claims against the sheriff and jail administrator upon finding that they were barred by the applicable state statute of limitations. Subsequently, the district court granted summary judgment in favor of the County upon finding that the sheriff and the sheriff's administrative staff, rather than the County, were responsible for the operation of the jail and that after their dismissal from the case there was no viable defendant. The plaintiff appealed both orders, and the two appeals were consolidated by this court.

There have been several significant decisions by the Supreme Court of the United States and by this court since the district court entered its orders in this case. In *Wilson v. Garcia,* — U.S. —, 105 S. Ct. 1938 (1985), the Supreme Court determined that all section 1983 claims should be characterized in the same way for limitations purposes and that such claims are best characterized as personal injury actions. In *Garcia* the Supreme Court then decided that the applicable state statute of limitations which applied generally to personal injury actions was the proper one to be applied in that section 1983 case. In *Mulligan v. Hazard,* — F.2d —, (6th Cir. No. 84-3555, decided Nov. 26, 1985), this court determined that *Wilson v. Garcia* should be applied retroactively. If the district court had had the benefit of the decisions in *Wilson v. Garcia* and *Mulligan v. Hazard* it would have been compelled to conclude that the present section 1983 action was subject to the three-year statute of limitations for personal injury claims set forth in MCLA § 600.5805(8). Accordingly, the orders dismissing the claims against Wilkerson and Lucas must be vacated and the case remanded for further proceedings with respect to those claims.

With respect to the claim against Wayne County, it appears that a decision of this court rendered after the decision of the district court undercuts the reasoning of the district court in dismissing the claims against the County. In *Marchese v. Lucas,* 758 F.2d 181 (6th Cir. 1985), this court held Wayne County liable for the acts of the county sheriff in a section 1983 action alleging mistreatment of a prisoner in the county jail. In reaching this conclusion, this court relied in part on the decision of the Supreme Court of the United States in *Brandon v. Holt,* — U.S. —, 105 S. Ct. 873 (1985). These recent decisions require reversal of the order dismissing the claims against Wayne County.

The judgments appealed from are reversed. The claims against Wilkerson and Lucas are remanded for further proceedings and the claims against Wayne County are remanded for reconsideration in the light of *Brandon v. Holt* and *Marchese v. Lucas,* and such further proceedings as may be required.

Upon remand the district court will also consider the recent decisions of the Supreme Court in *Daniels v. Williams,* — U.S. —, 54 U.S.L.W. 4090 (1-21-86), and *Davidson v. Cannon,* — U.S. —, 54 U.S.L.W. 4095 (1-21-86).

APPENDIX "B"

No. 84-1291
No. 84-1292

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIMOTHY CARROLL,

Plaintiff-Appellant,

v. ORDER

FRANK WILKERSON and
WILLIAM LUCAS (84-1291) (Filed March 12, 1986)

COUNTY OF WAYNE (84-1292)

Defendants-Appellees.

_____/

BEFORE: LIVELY, Chief Judge; WELLFORD, Circuit Judge; and PORTER, Senior District Judge*.

The appellee County of Wayne has filed a petition for rehearing which the original panel has considered. The per curiam filed January 23, 1986 is amended in the following respect only: There is added a sentence at the end of the per curiam opinion to read as follows:

> Upon remand the district court will also consider the recent decisions of the Supreme Court in *Daniels v. Williams,* — U.S. —, 54 U.S.L.W. 4090 (1-21-86), and *Davidson v. Cannon,* — U.S. —, 54 U.S.L.W. 4095 (1-21-86).

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman,
Clerk

*The Honorable David Porter, Senior Judge, United States District Court for the Southern District of Ohio, sitting by designation.

APPENDIX "C"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY CARROLL,

Plaintiff,

vs. CIVIL ACTION
No. 82-74058

FRANK WILKERSON, WILLIAM LUCAS, PERRY JOHNSON, COUNTY OF WAYNE, WAYNE COUNTY BOARD OF COMMISSIONERS, RICHARD MANNING, and TWO UNNAMED GUARDS OF THE WAYNE COUNTY JAIL,

Defendants.

_____/

OPINION

Plaintiff, Timothy Carroll, instituted this civil rights action on October 28, 1982. Plaintiff's complaint arises from an incident occurring in the Wayne County Jail on the evening of October 30-31, 1979, and relates the following history.

On October 16, 1979, plaintiff was placed in the Wayne County facility for violating his probation on a non-assaultive crime. Plaintiff was housed in an open cell block with six other inmates. Plaintiff alleges that the cell block was reserved for inmates with alcohol and drug problems. Plaintiff states that on the evening of October 30-31, 1979, he was assaulted and raped by the other inmates. Plaintiff asserts that at no time during the entire night did any

guards make rounds, nor were any guards observable. On October 31, at approximately 7:00 AM, plaintiff was taken from his cell to be arraigned. At that time he informed a guard of what had occurred and was taken to the Detroit General Hospital for treatment. Plaintiff subsequently filed this suit, alleging violations of his constitutional rights, 42 U.S.C. § 1983, and violations of state law. Now before the court are motions by defendants Perry Johnson, Director of the Michigan State Department of Corrections, and Frank Wilkerson, Administrator of the Wayne County Jail, for dismissal or for summary judgment.

• • •

[Continuing at Opinion, p. 8]

Defendant Wilkerson, the Administrator of the Wayne County Jail, raises a different issue than those presented by defendant Johnson. Defendant Wilkerson contends that, as to him, this action is barred by the statute of limitations. Defendant correctly notes that 42 U.S.C. § 1983 contains no statute of limitations, and that courts must look to the applicable state statute, *Board of Regents v. Tomanio*, 446 U.S. 478 (1980). Defendant argues that the appropriate Michigan statute would be that governing actions against sheriffs for neglect of office, M.C.L.A. § 600.5805(5), or that governing actions for assault, battery, or false imprisonment, M.C.L.A. § 600.5805(2). Both of the above statutes provide for a two-year period of limitations and, under either provision, plaintiff's complaint would be barred. Plaintiff, in reply, contends that the three-year limitation period for injuries to persons or property, M.C.L.A. § 600.5805(8), is the most analogous statute to apply.

The Sixth Circuit has produced inconsistent case law as regards the appropriate statute of limitations for § 1983 actions instituted in Michigan. Most recently, in *Kilgore v. City of Mansfield, Ohio*, 679 F.2d 632 (1982), the court affirmed the application of an Ohio statute of limitations which governed actions for malicious prosecution and false imprisonment to an action against the City of Mansfield and a city policeman for an incident involving plaintiff's arrest. The alternative statute was one which governed liability created by statute, arguably an appropriate statute to apply to a § 1983 action. In affirming the district court, the Sixth Circuit noted that the district court chose the statute which was "'[o]n its face, . . . "the most closely analogous" limitation . . . for the factual predicate of plaintiff's complaint.'" 679 F.2d at 634. While this court finds *Kilgore* somewhat troubling, since it suggests that different statutes of limitations would apply to different defendants in a § 1983 action, the court nonetheless feels bound to apply the reasoning of *Kilgore* to the instant case.

Turning to plaintiff's complaint, and looking for the statute which contains the most analogous factual predicate, the court finds that the two-year provision for misconduct or neglect of office must be applied. In Count II of plaintiff's first amended complaint, ¶¶ 27 and 28, defendant Wilkerson is specifically identified as the agent of the sheriff and charged with the same duties and obligations as the sheriff. Paragraph 29 specifically alleges the failure of defendant Wilkerson with regard to the above-mentioned duties. Although Count II is grounded in state law, it provides the basis fo. the federal constitu-

tional claims in Counts IV and V. As administrator of the Wayne County Jail, defendant is also a deputy.

Plaintiff contends that defendant is being sued in his capacity as administrator rather than in his capacity as deputy. This argument overlooks the fact that the complaint specifically alleges that defendant's duties as administrator derive from his status as an employee or agent of the sheriff. Plaintiff contends that the language of the provision explicitly limits its protection to the sheriff rather than to deputy sheriffs. This argument overlooks the fact that *Kilgore* requires the court to apply the closest factual analogue. Finally, plaintiff contends that the complaint alleges willful or wanton conduct on the part of defendant which removes this claim from the language of the provision as beyond mere "misconduct or neglect." The court finds, however, that "willful and wanton" would fall within the contours of "misconduct," and that the conduct alleged in the complaint is the failure to perform duties explicitly linked to the office of the sheriff. The court will therefore grant defendant Wilkerson's motion to dismiss.

/s/ Ralph B. Guy, Jr.
United States District Judge

DATED: JUNE 14, 1983

APPENDIX "D"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY CARROLL,

Plaintiff,

vs.

CIVIL ACTION
No. 82-74058

FRANK WILKERSON, WILLIAM LUCAS, PERRY JOHNSON, COUNTY OF WAYNE, WAYNE COUNTY BOARD OF COMMISSIONERS, RICHARD MANNING, and TWO UNNAMED GUARDS OF THE WAYNE COUNTY JAIL,

Defendants.

_____/

ORDER DENYING, IN PART WITHOUT PREJUDICE, DEFENDANT JOHNSON'S MOTION TO DISMISS and GRANTING DEFENDANT WILKERSON'S MOTION TO DISMISS

This matter is before the court on motions to dismiss or for summary judgment filed by defendants Perry Johnson and Frank Wilkerson. The court has reviewed the motions and the briefs filed in support thereof and in opposition thereto, and, in accordance with the attached Opinion;

IT IS ORDERED that Defendant Johnson's Motion to Dismiss, based upon the eleventh amendment issue, is DENIED WITHOUT PREJUDICE, and that Defendant Johnson's Motion to Dismiss, in all respects except the eleventh amendment issue, is DENIED.

IT IS FURTHER ORDERED that Defendant Wilkerson's Motion to Dismiss is GRANTED.

/s/ Ralph B. Guy, Jr.
United States District Judge

DATED: JUNE 14, 1983

APPENDIX "E"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY CARROLL,

Plaintiff,

vs.

CIVIL ACTION
No. 82-74058

FRANK WILKERSON, WILLIAM LUCAS, PERRY JOHNSON, COUNTY OF WAYNE, WAYNE COUNTY BOARD OF COMMISSIONERS, RICHARD MANNING, and TWO UNNAMED GUARDS OF THE WAYNE COUNTY JAIL,

Defendants.

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OPINION

This matter is before the court on defendant William Lucas' motion to dismiss. As grounds for his motion, defendant contends that this action is barred by the statute of limitations. Defendant, the Sheriff of Wayne County, contends that the appropriate statute to apply in an action under 42 U.S.C. § 1983 is the most analogous state statute of limitations, *Kilgore v. City of Mansfield, Ohio*, 679 F.2d 632 (6th Cir. 1982). Defendant asserts that the most analogous statute for the present matter is M.C.L.A. § 600.5805(5), which governs actions against sheriffs for misconduct or neglect of office. Under the aforementioned statute, plaintiff's action would be time barred. Further, defendant contends that the court has already determined

that the above-cited provision was the appropriate statute with regard to a codefendant who was both an agent of the sheriff and a deputy sheriff. Defendant Lucas argues that the same reasoning must be applied to the sheriff as to his agents, and that the court's prior ruling therefore applies to bar this action with respect to him. In reply, plaintiff argues that the court should apply a different statute of limitations. In essence, plaintiff contends that the analysis endorsed by the *Kilgore* court is simply incorrect. Plaintiff suggests that a more appropriate analysis has been employed in different circuits.

As noted by defendant, the court, by order entered June 14, 1983, dismissed the action against a codefendant, Frank Wilkerson. In the opinion which accompanied that order, the court found that the most analogous statute of limitations for an agent of the sheriff was M.C.L.A. § 600.5805(5). Although the court noted that it found the *Kilgore* opinion troubling in certain respects, the court stated that it was nonetheless bound by the Sixth Circuit's reasoning. Plaintiff has presented nothing which suggests that the Sixth Circuit has retreated from its position in *Kilgore*. Moreover, plaintiff has presented no argument which effectively distinguishes the position of defendant Lucas from that of his codefendant Frank Wilkerson. The court concludes that the same analysis applied by the court earlier with respect to defendant Wilkerson must be applied to defendant Lucas. The court hereby incorporates that portion of its opinion of June 14, 1983, which relates to the issue of the statute of limitations, and finds that it must grant defendant Lucas' motion to dismiss.

/s/ Ralph B. Guy, Jr.
United States District Judge

DATED: NOV. 22, 1983

APPENDIX "F"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY CARROLL,

Plaintiff,

vs.

FRANK WILKERSON, WILLIAM LUCAS, PERRY JOHNSON, COUNTY OF WAYNE, WAYNE COUNTY BOARD OF COMMISSIONERS, RICHARD MANNING, and TWO UNNAMED GUARDS OF THE WAYNE COUNTY JAIL,

Defendants.

CIVIL ACTION
No. 82-74058

ORDER GRANTING DEFENDANT
LUCAS' MOTION TO DISMISS

This matter is before the court on defendant William Lucas' motion to dismiss. The court has reviewed the motion and the briefs filed in support thereof and in opposition thereto and, in accordance with the attached Opinion;

IT IS ORDERED that Defendant Lucas' Motion to Dismiss is GRANTED.

RALPH B. GUY, JR.
United States District Judge

DATED: NOV. 22, 1983

APPENDIX "G"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY CARROLL,

Plaintiff,

vs.

CIVIL ACTION
No. 82-74058

FRANK WILKERSON, WILLIAM LUCAS, PERRY JOHNSON, COUNTY OF WAYNE, WAYNE COUNTY BOARD OF COMMISSIONERS, RICHARD MANNING, and TWO UNNAMED GUARDS OF THE WAYNE COUNTY JAIL,

Defendants.

_____/

Detroit, Michigan
Wednesday, February 15, 1984
P.M. Session

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• • •

THE COURT: O.K., thank you. I appreciate the lengthy arguments and the presentations, as well as the briefs.

The Court has before it today the motion of defendant County of Wayne and Richard Manning to dismiss both the state and Federal causes of action asserted against them in this complaint.

The Court has indicated to the parties that it is interested primarily in considering initially the Federal causes

of action, because if there are no Federal causes of action, the Court would not keep the pendent state claims.

And, although it's tangential to the main thrust of what I want to deal with here this evening, I, nonetheless, want to indicate that in this particular case, there is very strong reason why this Court should not get involved with any state claims if there is no Federal jurisdiction. And that is because each and every one of the state claims asserted here are entwined and immeshed with the law as it exists today of governmental immunity both as to entities and officials in the State of Michigan. And although I would not expect that everything that I will say here to be agreed with by attorneys in this courtroom or attorneys at large, I feel very safe in saying that there is not an attorney who has traveled in the vineyard of governmental immunity in the State of Michigan that will not concede its status is a mess at this particular time. And the Supreme Court realizes it. They have ordered certain cases re-argued; and the bench and bar of the state are waiting breathlessly, if you will, for clarification from the Michigan Supreme Court on the question of governmental immunity.

So I would be sorely tempted, even in the event that I find a Federal nexus for this litigation, to abstain on all of the questions, state law questions that involve governmental immunity, because it is a particularly inappropriate time for a Federal judge to be opining on the question of governmental immunity when it appears that the Supreme Court of the State of Michigan has finally decided to tackle this monster as an entity and perhaps at least for the moment clear up for all of us just what the ground rules are. So this matter is very appropriately, under the circumstances, considered initially to see whether there is a Federal basis for this litigation.

The Federal basis is primarily a 1983 action. Although other sections of the Constitution are implicated, they are not implicated in a manner that they would survive if a 1983 action wouldn't survive.

Additionally, there is a governing body of law that indicates that if you have a 1983 action, you don't have a direct constitutional action, that the analogy to Bivens' type actions is misplaced because Bivens was a judicial creation that was necessary to give relief to someone who would not have a right of redress without the recognition of a direct constitutional form of action, because 1983 is limited to state action and if who you are going after is a Federal official, 1983 obviously, by its express literal terminology would not cover that. So this is appropriately analyzed in terms of whether the plaintiffs have set forth a 1983 action against the defendant Richard Manning and against the defendant County of Wayne.

• • •

[Continuing at Transcript, p. 7]

Turning now to the County of Wayne, this analysis is made a little more difficult, but the difficulty arises not from facts in dispute, but from facts that are integrally to or analogous of the County's role, and are complex in nature.

The Court would incorporate by reference its dialog with both counsel on these issues so that it is not necessary to repeat everything that was said.

Suffice it to say in the State of Michigan, under the 1963 Constitution, the state preserved some historical relationships that existed between county units of the Government and various elected county officials. Although there was considerable pressure exercised by academic students

of Government at least to put the sheriff under the direction of the county and to provide indeed a county executive —which was later done—the forces that fought for the independence of the office of sheriff prevailed and the office of sheriff was not only left separate and apart from being under the wing of County Government in general or, rather, under the control of County Government in general, but a variety of Michigan statutes—some of them ancient and some of them not so ancient—preserve and protect a number of sheriff's prerogatives which have existed since time immemorial in the State of Michigan. Under the laws of the State of Michigan, the sheriff has the responsibility for the running and operation on a day-to-day basis of the county jail, and is the primary person responsible for the care and safety of the inmates housed therein.

As I stated in the dialog with plaintiff's counsel, we wouldn't be here into the evening in this case were it not for the fact that in an earlier motion, the sheriff, who was originally a named defendant in this case, was dismissed, as was the hierarchy of the sheriff's administrative staff. They were dismissed on statute of limitations grounds. And so the plaintiff found himself in a position where the defendants that everyone would admit have responsibility, if within that responsibility a cause of action can be stated against them, are no longer parties to this litigation, and the plaintiff is left to try to assert a cause of action against individuals and entities that have a much more tenuous connection to the events in question that form the plaintiff's cause of action.

There is no dispute that prior to the decision in Monell, the county could not even have been named as a defendant in a lawsuit such as this. Subsequent to Monell,

governmental units were made subject to 1983 actions under two circumstances: one, that the liability, if any, did not flow from the application of the doctrine of respondeat superior; and, two, that in order for there to be liability, a custom, practice or policy of the municipality had to be implicated.

Since then, there have been no shortage of decisions which have wrestled with the question of when is a custom, practice or policy implicated. In fact, in this district alone where there is a large number of 1983 actions filed every year—one of the largest filings of 1983 actions in the entire United States—it is safe to say that in each and every action filed implicating municipal action or county action since that date, that the parties—by "that date," I mean the decision in Monell—the parties have universally added the governmental unit, with the conclusionary allegations that the damage done to the plaintiff was the result of a custom, practice or policy of the governmental unit involved. And just as the Supreme Court apparently felt in Monell—since there was some language to this effect—that it would be a lot neater if everybody just sort of sued the governmental unit and didn't implicate all of these individuals, since in many instances, the governmental unit was standing behind them or paying the judgments, let's sort of clean up the whole act and just go after the governmental unit.

Unfortunately, it hasn't worked that way, because it has not been an in-lieu-of situation, but it has turned into an in-addition-to situation. And we now find all of the individuals that were ever implicated before still being implicated along with the governmental units that are involved.

Plaintiffs make an argument in this case that the County of Wayne has certain responsibilities for the maintenance of the jail that are placed upon them by state law, and that they failed in their responsibility, specifically to have an auditory or visual monitoring system over the cell in which this plaintiff was housed and that, therefore, this breach of duty in the face of some knowledge that can be attributed to them of prior rapes that have occurred in the county jail amounts to a custom, practice or policy which should make them a viable defendant in this case.

After carefully considering that argument, this Court feels compelled to reject it for a number of reasons.

First, the argument completely overlooks a key fact that simply can't be overlooked. And that is that it is the Sheriff of Wayne County and not the County of Wayne as an entity that has the day-to-day responsibility for the running of the jail. The attempt here to point an accusatory finger at an appliance, if you will, a piece of hardware or the lack of a piece of hardware really has its genesis in state law decisions which have in some instances construed the County's responsibility under the statutes that require them to be the physical keeper of the bricks and mortar of a jail. Certain Michigan Supreme Court cases have construed that responsibility to include certain safe-keeping responsibilities of inmates within the jail where, in fact, the injury of the inmate can be tied directly or indirectly to something connected with the building. Perhaps the classic example is the case in which an inmate hanged himself and, since he was put in a jail cell that had bars on it and the bars were a convenient device from which one could hang himself, the Michigan Supreme Court ruled that this was an act that involved in effect the bricks and

mortar of the building, and kept the county in as a defendant, or the city as the case may be, whoever was responsible for the jail in that particular case.

Again, as referenced earlier in the discussion, because the sheriff and the sheriff's administrative staff are no longer defendants in this case, for all practical purposes—unless the plaintiff can tie in the County of Wayne—they have no viable defendant at this juncture.

In analyzing whether—taking those allegations as alleged at face value, whether that implicates a custom, practice or policy, it appears to this Court that some additional thought has to be given to the purposes behind implicating governmental units at all as a result of a custom, practice or policy.

It would appear to this Court that the rationale is predicated upon the fact that 1983 actions historically were actions against individuals, and that the decision in Monell was a realization that there may be situations in which it was appropriate to involve the entire body politic, in other words, when you're suing the County of Wayne, you're suing the citizens of the County of Wayne; and, in order to implicate them in their wrongful acts, you cannot do so on the basis of isolated acts or on the basis of negligence or intentional wrongs of subordinates; but you must have some conduct that rises to the heights of a practice, policy or custom.

Now, there is no doubt, as plaintiff suggests, that to have a policy doesn't mean the Wayne County Board of Commissioners had to have passed a resolution or an ordinance. Similarly, there is no doubt that there are cases which hold that even where the incident complained of was

isolated, a practice, policy or custom may be implicated. However, in all of those cases, although there may have been only one specific incident complained of, the facts which indicated what the climate was establishing the custom, policy or practice of the municipality were very clear.

Here the situation is that the sheriff has day-to-day control of that jail. But for the fact that we don't have the sheriff in this case any longer, little time would be spent in trying to implicate a physical appliance or the absence thereof. And the attempt to translate that lapse, if indeed it was a lapse, into a practice, policy or custom simply stretches that concept too far.

The correct and only reasonable analysis of what happened to the plaintiff in this case in terms of someone else's fault has to be characterized as a lack of proper supervision. The sheriff is there on a day-to-day basis; he staffs the jail; it is his responsibility to carry out the actual physical monitoring of the prisoners as required by the State Bureau of Prisons' regulations. And to say that because the County negotiated, if you will, to install—assuming that the sheriff could not have installed it himself, of course, but that it was the County and solely the County's responsibility to put in some monitoring system which wasn't there, then that amounts to a custom, policy or practice of the County.

The Court simply cannot adopt that line of reasoning. It finds it completely far-fetched and an extension of the Monell doctrine far beyond that which was ever intended.

The Court feels here also compelled to grant the motion for summary judgment.

The Court would also note, although it is not basing its ruling on it, that it would be prepared as a matter of law to say that even if the plaintiff could get over the custom, practice or policy part of this equation, that the plaintiff simply could not show proximate cause. The reason for that is that in terms of a rape occurring in a jail in which there were individuals other than the plaintiff housed, the most that the testimony would ever be able to show is that a monitoring system might or might not have helped prevent this particular occurrence. There are so many variables and so many other factors that you could never establish as a matter of law a proximate causal relationship in these particulars. As I stated, I am not basing my ruling on that, but simply by way of dicta commenting that that is also a hurdle which the Court feels is insurmountable for the plaintiff under the circumstances.

So, for the reasons indicated, the motion is granted.

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APPENDIX "H"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY CARROLL,

Plaintiff,

vs.

CIVIL ACTION
No. 82-74058

FRANK WILKERSON, WILLIAM LUCAS, PERRY JOHNSON, COUNTY OF WAYNE, WAYNE COUNTY BOARD OF COMMISSIONERS, RICHARD MANNING, and TWO UNNAMED GUARDS OF THE WAYNE COUNTY JAIL,

Defendants.

_____/

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO FEDERAL CLAIMS and DISMISSING WITHOUT PREJUDICE STATE CLAIMS AGAINST DEFENDANTS MANNING AND COUNTY OF WAYNE

This matter is before the court on the motion of defendants County of Wayne and Richard Manning for summary judgment. The court has reviewed the motions and the briefs filed in support thereof and in opposition thereto and, in accordance with the bench Opinion rendered following oral argument on February 15, 1984:

IT IS ORDERED that Defendants' Motion for Summary Judgment is GRANTED as to the federal claims.

IT IS FURTHER ORDERED that the state claims against defendants Manning and County of Wayne are DISMISSED WITHOUT PREJUDICE for lack of federal jurisdiction.

/s/ Ralph B. Guy, Jr.
United States District Judge

DATED: FEB. 17, 1984

APPENDIX "I"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY CARROLL,

Plaintiff,

vs.

CIVIL ACTION
No. 82-74058

FRANK WILKERSON, WILLIAM LUCAS, PERRY JOHNSON, COUNTY OF WAYNE, WAYNE COUNTY BOARD OF COMMISSIONERS, RICHARD MANNING, and TWO UNNAMED GUARDS OF THE WAYNE COUNTY JAIL,

Defendants.

_____/

ORDER GRANTING PLAINTIFF'S MOTION FOR ORDER OF DISMISSAL, DISMISSING DEFENDANT WAYNE COUNTY BOARD OF COMMISSIONERS and ENTERING FINAL JUDGMENT AS TO ALL DEFENDANTS TO THIS ACTION

This matter is before the court on plaintiff's motion for an order of dismissal as to defendant Wayne County Board of Commissioners. The court has reviewed the record and the file, and it appears that upon the dismissal of the Wayne County Board of Commissioners, no further defendants will remain as parties to this action. Accordingly;

IT IS ORDERED that Plaintiff's Motion for Order of Dismissal is GRANTED, and that the claims against the Wayne County Board of Commissioners are hereby DISMISSED.

IT IS FURTHER ORDERED that Civil Action No. 82-74058 is closed, and that final judgment is entered as to each defendant to this action.

/s/ Ralph B. Guy, Jr.
United States District Judge

DATED: MAR. 26, 1984

APPENDIX "J"

No. 84-1291/2

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIMOTHY CARROLL,

Plaintiff-Appellant,

v.

FRANK WILKERSON, ET AL.,

Defendants-Appellees.

ORDER
(Filed May 2, 1986)

BEFORE: LIVELY, Chief Judge, WELLFORD, Circuit Judge, and PORTER*, Senior U.S. District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk

---

*Hon. David S. Porter sitting by designation from the Southern District of Ohio

---

APPENDIX "K"

The Act of June 15, 1836, 5 Stat. 49 § 2 provided:

And be it further enacted, That the Constitution and state government which the people of Michigan have formed for themselves be, and the same is hereby accepted, ratified and confirmed, and that the said state of Michigan shall be, and is hereby declared to be one of the United States of America, and is hereby admitted into the Union upon an equal footing with the original states, in all respects whatever: Provided, always, And this admission is upon the express condition, that the said state shall consists of, and have jurisdiction over, all the territory included within the following boundaries, and over none other, to wit: Beginning at the point where the above described northern boundary of the state of Ohio intersects the eastern boundary of the state of Indiana, and running thence with the said boundary line of Ohio, as described in the first section of this act, until it intersects the boundary line between the United States and Canada, in Lake Erie; thence with the said boundary line between the United States and Canada, through the Detroit river, Lake Huron and Lake Superior, to a point where the said line last touches Lake Superior; thence in a direct line through Lake Superior, to the mouth of the Montreal river; thence through the middle of the main channel of the said river Montreal, to the middle of the Lake of the Desert; thence in a direct line to the nearest head water of the Menominie river; thence through the middle of that fork of the said river first touched by the said line, to the main channel of the said Menominie river; thence down the centre of the main channel of the same, to the centre of

the most usual ship channel of the Green Bay of Lake Michigan; thence through the centre of the most usual ship channel of the said bay, to the middle of Lake Michigan; thence through the middle of Lake Michigan to the northern boundary of the state of Indiana, as that line was established by the act of congress of the nineteenth of April, eighteen hundred and sixteen; thence due east, with the north boundary line of the said state of Indiana, to the northeast corner thereof; and thence south, with the east boundary line of Indiana, to the place of beginning.

OPPOSITION

BRIEF

86-158

No.

In The Supreme Court of the United States

October Term 1986

County of Wayne, Wayne County Sheriff, and Wayne County Jail Administrator,

Petitioners,

v.

Timothy Carroll,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Law Office of Deborah LaBelle and Julie H. Hurwitz, P.C.
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26 pp

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STATUTES INVOLVED

42 USC § 1983 provides in its entirety:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress"

MCLA § 45.401 provides in its entirety:

> Sec. 1. (1) The county board of commissioners of each county in this state may direct the payment to the sheriff, under-sheriff, and deputy sheriffs and to the county clerk, county treasurer, register of deeds, and their deputies out of the general fund in the treasury of the county, salaries as the board considers proper. The salaries may be fixed and determined by the county board of commissioners at its annual meeting held in October before the commencement of the terms of the officers. The salaries shall be compensation in full for all services performed by the sheriff, under-sheriff, and deputy sheriffs and by the county clerk, county treasurer, register of deeds, and their deputies. However, this section shall not apply to a county now operating under a local or special act, until the local or special act is repealed.
>
> (2) Notwithstanding subsection (1), for a county which has a county officers compensation commission, the compensation of each nonjudicial elected officer of the county shall be determined by that commission. A change in compensation for those officers of a county which has a county officers compensation commission shall commence at the beginning of the first odd numbered year after the determination is made by the county officers compensation commission and is not rejected."

MCLA § 45.16 provides in its entirety:

"Sec. 16. Each organized county shall, at its own cost and expense, provide at the county seat thereof a suitable courthouse, and a suitable and sufficient jail and fireproof offices and all other necessary public buildings, and keep the same in good repair. However, and notwithstanding the provisions of section 11 of Act No. 156 of the Public Acts of 1851, as amended, being section 46.11 of the Compiled Laws of 1948, a jail may be located anywhere in the county. Before the plan of any jail which has been duly authorized to be built shall be determined or accepted, or contracted for, the plan shall be submitted to the department of corrections * * * for its examination and opinion, and such department shall carefully examine and give the benefit of its study and experience in such matter to the counties submitting such plans and report its opinion to the county clerk of the county so submitting plans. No contract for the erection of any county jail shall be valid or binding, nor shall any money be paid out of the county treasury for the construction of a jail until such opinion has been filed with the county clerk of the county submitting such plans."

MCLA § 46.7 provides in its entirety:

"Sec. 7. It shall be the duty of the board, as often as shall be necessary, to cause the courthouse, jail, and all other public buildings and public offices of the county, to be duly repaired at the expense of the county. The county board of commissioners of a county may, subject to the limitations provided in Act No. 62 of the Public Acts of 1933, as amended, being sections 211.201 to 211.217a of the Michigan Compiled Laws, levy a tax on the taxable property in the county for the construction or repair of public buildings or bridges. The foregoing limitations shall not apply to taxes imposed for the payment of principal and interest on bonds or other evidences of indebtedness or for the payment of

assessments or contract obligations in anticipation of which bonds are issued, which taxes may be imposed without limitation as to rate or amount and in addition to any other taxes, even though the bonds or other evidences of indebtedness were issued for the foregoing purposes. The repair of the courthouse, jail, and all other public buildings and public offices of the county is hereby declared to be a current county operating expense for which the foregoing provisions are not to be considered as the exclusive means of financing; the county board of commissioners may authorize the use of any county collections not raised by taxation and under their control for current county operating expenses, for the repair of public buildings owned by county. * * * The amount of money spent for the repair of county buildings in any 1 fiscal year from funds not raised by taxation and under control of the county board of commissioners for current operating expenses, shall not exceed the total amount of such money collected in that year, except as otherwise provided by law unless submitted to the electors of the county and approved by a majority of those voting thereon."

MCLA § 46.8 provides in its entirety:

"Sec. 8. They shall also cause to be prepared within the jails of their respective counties, at the expense of such counties, so many cells for the reception of convicts, as they may deem necessary."

MCLA §691.1406 provides in its entirety:

Sec. 6. Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the government agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to

remedy the condition or to take action reasonably necessary to protect the public against the condition. Knowledge of the dangerous and defective condition of the public building and time to repair the same shall be conclusively presumed when such defect existed so as to be readily apparent to an ordinary observant person for a period of 90 days or longer before the injury took place. As a condition to any recovery for injuries sustained by reason of any dangerous or defective public building, the injured person, within 120 days from the time the injury occurred, shall serve a notice on the responsible governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

SERVICE OF NOTICE: FILING OF NOTICE WITH STATE

The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the responsible governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding. If required by the legislative body or chief administrative officer of the responsible governmental agency, the claimant shall appear to testify, when physically able to do so, and shall produce his witnesses before the legislative body, a committee thereof, the chief administrative officer, his deputy, or a legal officer of the governmental agency, as directed by the legislative body or by the chief administrative officer of the responsible governmental agency, for examination under oath as to the claim, the amount thereof, and the extent of the injury. Notice to the state of Michigan shall be given as provided in section 4. No

action shall be brought under the provisions of this section against any governmental agency, other than a municipal corporation, except for injury or loss suffered after July 1, 1965. (Footnote omitted)

MCLA § 600.5805 provides in its entirety:

> Sec. 5805. (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
>
> (2) The period of limitations is 2 years for an action charging assault, battery, or false imprisonment.
>
> (3) The period of limitations is 2 years for an action charging malicious prosecution.
>
> (4) The period of limitations is 2 years for an action charging malpractice.
>
> (5) The period of limitations is 2 years for an action against a sheriff charging misconduct or neglect of office by the sheriff or the sheriff's deputies.
>
> (6) The period of limitations is 2 years after the expiration of the year for which a constable was elected for actions based on the constable's negligence or misconduct as constable.
>
> (7) The period of limitations is 1 year for an action charging libel or slander.
>
> (8) The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

(9) The period of limitations is 3 years for a products liability action. However, in the case of a product which has been in use for not less than 10 years, the plaintiff, in proving a prima facie case, shall be required to do so without benefit of any presumption.

SUMMARY OF ARGUMENT

This Court has recently resolved and settled the federal question of the appropriate characterization of 1983 causes of action for statute of limitation purposes in *Wilson* v *Garcia*, ___ U.S. ___, 105 S.Ct. 1938, L.Ed. 2d 254 (1985). The Court of Appeals, having the benefit of *Wilson* v. *Garcia*, appropriately applied the decision in holding that the applicable statute of limitations for 1983 causes of actions arising in the State of Michigan is the three-year statute for "injury to the person". MCLA 600.5808(8).

The Court of Appeals further held their decision to be retroactive in conformance with the Court's prior holding in *Mulligan* v *Hazard* 777 F.2d 340 (6th Cir. 1985), in which this Court recently denied a Petition for Writ of Certiorari. cert denied, 54 U.S.L.W. 3808 (U.S. June 9, 1986) (No. 85-1641).

There being no special or important reason for accepting this Petition, and this Court having resolved the issues and no relevant conflict existing between the Circuits, a grant of this writ should not issue. United States Supreme Court Rules, Rule 17.

The Court of Appeals properly held that Respondent sufficiently alleged a "custom, policy or practice" of systematic failure to provide reasonable protection against the foreseeable harm of sexual assault in the County Jail against Petitioner COUNTY based on acts of Petitioner LUCAS, the County Sheriff.

Since a municipality can act only through "natural persons," the acts of a supervisory and/or elected official, such as Petitioner LUCAS, within his official capacity, are acts of the municipality under 42 USC § 1983. The Court of Appeals properly looked to state law and determined that the Sheriff was acting as the final decision-maker for the County regarding the operation and maintenance of the County Jail. Respondent alleged facts establishing that Petitioner COUNTY, acting through Petitioner LUCAS, was

engaged in a "custom, policy or practice" which caused the constitutional deprivations of Respondent CARROLL. Therefore, as the Sixth Circuit Court of Appeals properly held, Respondent necessarily stated a viable § 1983 cause of action against Petitioner County.

The Court of Appeals' holding was consistent with all the relevant decisions of this Court and does not conflict with state law. Therefore, there is no need in this case for this Court to grant Petitioner a Writ of Certiorari. *Pembaur v. City of Cincinnati*, ____ U.S. ____; 106 S. Ct. 1292; 89 L. Ed 2d 452 (1986); *Brandon v. Holt*, ____ U.S. ____; 105 S. Ct. 873; 83 L. Ed. 2d 878 (1985); *Monell v. Department of Social Services of New York*, 436 U.S. 658; 98 S.. Ct. 2018; 56 L. Ed. 2d 611 (1978); see also: *Marchese v. Lucas*, 758 F. 2d 181 (6th Cir. 1985); *Lockaby v. County of Wayne*, 406 Mich. 65 (1979); MCLA § 45.16; MCLA § 45.401; MCLA § 46.7; MCLA § 46.8; MCLA § 691.1406.

I.

THIS COURT'S HOLDING THAT THE CHARACTERIZATION OF SECTION 1983 ACTIONS IS A FEDERAL QUESTION TO BE BROADLY ANALOGIZED TO A STATE PERSONAL INJURY STATUTE OF LIMITATIONS WAS PROPERLY APPLIED IN THE INSTANT CASE

Petitioners, in the U.S. District Court for the Eastern District of Michigan, argued that a two-year Michigan Statute of Limitations applicable to actions against the Sheriff was the appropriate limitations to be applied to Respondent CARROLL'S Section 1983 cause of action, based upon the status of the Petitioner Sheriff. The U.S. Court of Appeals for the Sixth Circuit reversed the District Court's decision, holding that the Michigan three-year statute of limitations for personal injuries applied, relying upon *Wilson v. Garcia*, ____ U.S. ____, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985).

The Court of Appeals, in following this Court's holding in *Wilson v. Garcia*, was consistent with prior Sixth Circuit Court of Appeals' decisions applying the Michigan three-year statute of limitations for an "injury to a person or a property," in Section 1983 actions. The Court of Appeals had previously held that:

> ". . . the essence of an action under Section 1983 is as the court recognizes, a claim to recover damages for injuries wrongfully done to the person."

Madison v. Wood, 410 F.2d 567 (6th Cir. 1969); *Marlowe v. Fisher Body*, 489 F.2d 1057 (6th Cir. 1973); MCLA 600.5805 (8).

This Court in *Wilson v. Garcia*, noted that:

> "The Section 1983 remedy encompasses a broad range of potential tort analogies, from injuries to property to infringement of individual liberty."

This Court, in holding that "a simple *broad* characterization of all Section 1983 claims best fits the statute's remedial

purpose," held that, rather than examine each underlying factual claim to determine at best a state analogy with no precise counterpart, leading to one or more applicable Statutes of Limitations, the characterization best fitting Section 1983 actions is one involving claims for personal injuries.

Wilson, supra, then applied the general "three-year Statute of Limitations governing actions for an injury to a person or reputation of any person," in that case.

Michigan has a state personal injury Statute of Limitations which the Court of Appeals in this case correctly held to be the most analogous to injuries to the person, following this Court's decision in *Wilson, supra.*

Petitioners essentially argue that this Court should return to the review of the Plaintiff's underlying factual claims in the Complaint for purposes of determining the appropriate state Statute of Limitations. This approach has been explicitly rejected by this Court upon a determination that: 1) Statute of Limitations for the state must be utilized for all Section 1983 causes of actions; and 2) the applicable Michigan Statute of Limitations, MCLA 600.5805(8), is not, as Petitioners attempt to characterize it, a catch-all Statute of Limitations. Rather, it is a three-year Statute of Limitations for death or personal injury to the person or property.

Michigan also has a one-year Statute of Limitations for the intentional tort of slander and libel, a two-year Statute of Limitations for causes of actions sounding in assault and battery and a separate two-year Statute of Limitations for actions alleging malicious prosecution. The sole Statute of Limitations in Michigan encompassing all personal injuries to the person is the Statute of Limitations appropriately applied by the Court of Appeals in this case.

Clearly, this Court recognized in *Wilson, supra,* that no state cause of action exactly paralles the Section 1983 cause of action. Therefore, one must broadly construe Section 1983 claims as being essentially for injuries to the person. The Court of Appeals properly adhered to this analysis.

The Petitioners' allegation that the Sixth Circuit Court of Appeals in *Mulligan v. Hazard,* 777 F.2d 340 (6th Cir. 1985), cert. den. 54 U.S. Law Week 3808 (U.S. June 9, 1986) (No. 85-1641), the other Sixth Circuit case referred to by Petitioners, has issued conflicting decisions is simply inaccurate, the Court of Appeals consistently followed this Court's decision in *Wilson, supra,* applying the appropriate statute in Ohio based upon that state's available Statute of Limitations.

The Court of Appeals in the instant case applied the same reasoning and interpretation of *Wilson, supra,* in determining that the Michigan three-year Statute of Limitations for injuries to the person is the most appropriate Statute of Limitations in the state of Michigan for Section 1983 causes of action.

It must also be noted that this Statute of Limitations has almost uniformly been applied in the U.S. District Courts in Michigan for Section 1983 actions, utilizing the rationale adopted by this Court in *Wilson, supra.* See eg, *Kurzawa v. Mueller,* 545 F. Supp. 1254 (E.D. Mich. 1982); *Abshier v. Tichvon,* 500 F. Supp. 444 (E.D. Mich. 1980); *Gordon v. City of Warren,* 415 F. Supp. 566 (E.D. Mich. 1976); *Krum v. Sheppard,* 255 F. Supp. 994 (W.D. Mich. 1966).

Finally, Petitioners cite *Daniels v. Williams,* ____ U.S. ____; 106 S.Ct. 662; 88 L.Ed.2d 662 (1986), and *Davidson v. Cannon,* ____ U.S. ____, 106 S.Ct. 668 88 L.Ed.2d. 677 (1986), as persuasive support for their Petition For Writ Of Certiorari. Petition For Writ Of Certiorari at 9, 12-14. This Court, while addressing in the above-noted cases the basis for causes of action alleged pursuant to Section 1983, did not make any changes in the Statute of Limitations as had already been set forth in *Wilson, supra.* While this Court held in *Daniels, supra,* and *Davidson, supra,* that the due process clause is not implicated by merely negligent conduct of government officials, this holding is irrelevant to the case at bar which does not involve allegations of mere negligence. Contrary to Petitioners' assertions, the Michigan Statute of Limitations for injuries to the person also does

not involve solely negligence claims at the state level. As noted above, this Court has stated that the comparison of Section 1983 causes of action to any analogous state Satute of Limitations will be inexact at best. However, this Court has stated that the Statute of Limitations providing forinjuries to the person is the most appropriate Statute of Lmitations to apply, which the Court of Appeals has followed in the instant case.

II.

RESPONDENT SUFFICIENTLY ALLEGED A "CUSTOM, POLICY OR PRACTICE" AGAINST PETITIONER COUNTY BASED ON ACTS OF PETITIONER SHERIFF LUCAS

Petitioner, COUNTY OF WAYNE, as a municipality, may be subject to liability under 42 U.S.C. Section 1983 for violations of persons' civil rights where:

> ". . . the action that is alleged to be unconstitutional implements or executes a policy, statement, ordinance, regulation, or decision officially adopted and promulgated by (its) officers . . . visited pursuant to governmental "custom" even though such custom has not received formal approval through . . . official decision making channels."

Monell v. Department of Social Services of New York, 436 U.S. 658, 690-691; 98 S.Ct. 2018; 56 L.Ed.2d 611 (1978).

Since a municipality can act *only* through "natural persons," the acts of supervisory and/or elected officials within their official capacities are tantamount to acts of the municipality under Section 1983. *Brandon v. Holt*, ____ U.S. ____; 105 S.Ct. 873; 83 L.Ed.2d 878 (1985); See also *Hutto v. Finney*, 437 U.S. 678; 98 S.Ct. 2565; 57 L.Ed.2d 522 (1978); and *Owens v. City of Independence*, 445 U.S. 622; 100 S.Ct. 1398; 63 L.Ed.2d 673 (1980).

In *Brandon, supra*, this Court held that a judgment against a supervisory public servant in his official capacity imposes liability on the entity that he represents. 105 S.Ct., at 878. That case was an action against a Director of a city police department in his official capacity. Similarly, this case is an action against a County Sheriff in his official capacity. The Sixth Circuit Court of Appeals' reliance in this case on *Brandon, supra*, was justified and requires no review by this Court, as Petitioner LUCAS' position is virtually indistinguishable from that of the Director in *Brandon*.

After the Court of Appeals' decision in this case, this Court announced its decision in *Pembaur v. City of Cincinnati*, ____ U.S. ____; 106 S.Ct. 1292; ____ L.Ed.2d ____ (1986), which also supports the position of Respondent herein. In *Pembaur, supra*, this Court deferred to the Sixth Circuit Court of Appeals' interpretation of state law, and determined that a county could be held liable under 42 U.S.C. Section 1983 for a single decision by a municipal policy-making official, in that case the county prosecutor. 106 S.Ct, at 1298. This Court said:

> "[T]he Court of Appeals concluded, based upon its examination of Ohio law, that *both the County Sheriff and the County Prosecutor could establish county policy* under appropriate circumstances, a conclusion that we do not question here. [fn. 13: We generally accord great deference to the interpretation and application of state law by the courts of appeals] . . . *[T]he County Prosecutor was acting as the final decision-maker for the county, and the county may therefore be held liable under Section 1983.*"

106 S.Ct., at 1301 (emphasis added) (citations omitted)

Similarly, in this case, Petitioner LUCAS "was acting as the final decision-maker for the county" regarding the operation and maintenance of the Wayne County Jail, including the implementation and enforcement of procedures and structures to protect against foreseeable sexual assaults in the Wayne County Jail. As this Court said in *Pembaur, supra:*

> We generally accord great deference to the interpretation and application of state law by the courts of appeals.

106 S.Ct., at 1301, fn. 13.

As such, it is appropriate and proper to accord such deference to the Court of Appeals' interpretation of the duties of Petitioner LUCAS in the case at bar. This Court's holdings in *Pembaur, supra*, and *Brandon, supra*, both indicate that Respondent in the case at bar has sufficiently alleged a "custom, policy or practice" under Section 1983 and *Monell, supra*, against Petitioner LUCAS in his official capacity.

Petitioners, in their Brief, argue that:

> "The law in Michigan is clear that a county sheriff is not a county official in the sense of being an instrumentality of county governmental power."

Petition For Writ of Certiorari, at 17.

In so arguing, the Petitioners have created an unnecessary conflict between the Michigan Constitution, on the one hand; and 42 U.S.C. Section 1983 and the United States Constitution, on the other hand. In the case at bar and in *Marchese v. Lucas*, 758 F2d 181 (6th Cir. 1985), the Sixth Circuit Court of Appeals did exactly what this Court subsequently would have instructed it to do, per *Pembaur, supra*, i.e. it carefully examined state law to determine whether the Defendant Sheriff LUCAS "could establish county policy," and/or "was acting as the final decision-maker for the county," in the course of the Sheriff's specific activities which are relevant to this case. In *Marchese, supra*, the Court of Appeals said:

> "Wayne County did not make policy for the Sheriff's Department. *The Sheriff is, however, the law enforcement arm of the County and makes policy in police matters for the County.* The County, through its Board of Supervisors, appropriates funds and establishes the budget for the Sheriff's Department. The Sheriff is elected by the voters of Wayne County . . . he is not an official of the State of Michigan or of the federal government. *He is, under the Constitution of Michigan, the law enforcement officer for the County of Wayne with extraordinary power to select his deputies and enforce the law.*"

"*We believe that the relationship between the County and the Sheriff's Department is so close as to make the County liable for the Sheriff's failure* to train and discipline his officers . . . "The County's reliance on Michigan law to exempt it from liability is clearly inappropriate under *Brandon* and for that matter under the federal Constitution's Supremacy Clause . . ."

58 F.2d, at 188-189 (emphasis added) (citations omitted)

Petitioner COUNTY can act only through natural persons. In this case, Petitioner LUCAS had exclusive control over the supervisory operations of the Wayne County Jail, which is owned, funded and maintained by the Petitioner COUNTY. Respondent has alleged facts which establish that the Petitioner COUNTY, acting through Petitioner LUCAS, was engaged in a "custom, policy or practice" of systematically failing to provide reasonable protection to Respondent, and others similarly situated, against the foreseeable harm of sexual assault in the jail. Therefore, as the Sixth Circuit properly held, Respondent has necessarily stated a viable Section 1983 cause of action against the Petitioner COUNTY. *Pembaur, supra; Brandon, supra; Monell, supra; Marchese, supra.*

Marchese, supra, is consistent with decisions of other federal appellate courts which have applied *Monell* to find municipal liability based on acts of municipal officers similarly situated to Petitioner LUCAS. *Van Ooteghem v. Gray,* 628 F.2d 488 (5th Cir. 1980), cert. den., 455 U.S. 909; 102 S.Ct. 1255; 71 L.Ed.2d 447 (1982); *Familias Unidas v. Briscoe,* 619 F.2d 391 (5th Cir. 1980); *Overbay v. Lilliman,* 572 F. Supp. 174 (W.D. Mo. 1983).

Overbay, supra, was strikingly similar to this case. The plaintiff brought a Section 1983 action against both the sheriff and the county as a result of treatment he received as a county jail inmate. The county brought a motion for summary judgment on the ground that:

" . . . under Missouri law (the county) is not responsible for the personnel in the sheriff's office. In other words, it has not created any policy concerning personnel of the sheriff's office."

572 F. Supp., at 176.

The court denied the county's motion, saying that:

"It is true as the defendant County points out, that in Missouri sheriffs are elected by the people of the county and not selected by the county (government), and that deputies are selected and salaries set by agreement between the sheriff and the circuit court for the county. *The County, as an entity . . . however, is not totally divorced from the operations of the sheriff's office.* The county (government) may purchase land for a jail, must erect and maintain a jail and supplies the vehicles for the sheriff's department . . . [I]t is the sheriff who sets the rules and regulations — the policy — for the sheriff's office. *As chief law enforcement officer of the county those policies become the policies of the county.*"

Id., at 176-177 (emphasis added) (citations and footnotes omitted).

The situation in Michigan is remarkably similar to that in Missouri, except that *in Michigan, counties have even more direct control over the salaries of the sheriff and his deputies,* MCLA 45.401, *and more statutory obligations regarding construction and conditions of the jail.* MCLA 45.16, 46.7, 46.8, 691.1406.

Petitioner LUCAS may be constitutionally independent of the Petitioner COUNTY *for purposes of liability under state law;* however, under 42 U.S.C. Section 1983 and *Monell, supra,* the sheriff's policies must, as articulated by the Fifth Circuit:

" . . . necessarily be considered those of one 'whose edicts or acts may fairly be said to represent official policy' for which the county may be responsible under Section 1983."

Familias Unidas, supra, 619 F.2d, at 404 (citing *Monell, supra).*[1]

Familias Unidas, supra, involved the liability of a county in Texas for the acts of a county judge. The First Circuit Court of Appeals said that:

> "Because of the unique structure of county government in Texas, the judge *like other elected county officials, such as the sheriff* and treasurer — holds virtually absolute sway over the particular tasks or areas of responsibility entrusted to him by state statute and is accountable to no one other than the voters for his conduct therein. Thus, at least *in those areas in which he, alone, is the final authority or ultimate repository of county power, his official conduct and decisions must necessarily be considered . . . to represent official policy . . . for which the county may be held responsible under Section 1983.*"

Id. (emphasis added) (citations omitted).

And in *Van Ooteghem, supra,* a case in which this Court properly denied certiorari, the plaintiff was unconstitutionally fired by the county treasurer, who, like the Wayne County Sheriff, was an independently elected official with complete authority under state law for hiring and firing of personnel within his department. The Fifth Circuit there said that:

> "When he acted, he acted for Harris County. When he so erred, he erred for the County. Pursuant to the test enunciated in *Familias* [defendant's] dismissal of [plaintiff] clearly represented 'official policy' for which Harris County may be held liable."

[1] It should be noted that state law in Michigan recognizes the potential liability of the COUNTY for acts of employees of the Sheriff's Department, other than the Sheriff. *Lockaby v County of Wayne,* 406 Mich 65 at 77 (1979). Who but such other employees carry out the policies and decisions of the sheriff? It thus necessarily follows that when agents of the County violate a citizen's constitutional rights pursuant to policies of the Sheriff, said policies must be considered policies of the County within the meaning of Section 1983 and *Monell, supra.*

638 F.2d, at 495 (footnote omitted).[2]

Contrary to Petitioners' argument, Petition For Writ of Certiorari, at 10-11, there is no conflict among the U.S. Circuit Courts of Appeals regarding the reconciliation of 42 USC § 1983 and *Monell, supra,* with state law. The U.S. Court of Appeals cases cited by Petitioners in support of the alleged conflict, *Rhode v. Denson,* 776 F.2d 107 (5th Cir. 1985), reh. den., 778 F.2d 790 (5th Cir. 1985), cert. den., *sub nom Rhode v. San Jacinto County,* 54 USLW 3809 (6-9-86); *Allen v. Fidelity & Deposit Co.,* 515 F.Supp. 1185 (D.S.C. 1981), aff'd without op., 694 F.2d 716 (4th Cir. 1982), consistently recognize the rule articulated in *Familias Unidas, supra,* and *Marchese, supra,* i.e., that the policies of supervisory and/or elected officials, in their official capacities, are tantamount to policies of the municipalities they represent for purposes of 42 USC § 1983. See also *Lopez v. Ruhl,* 584 F. Supp. 639, 649 (W. D. Mich). The U.S. District Court

[2] The Court of Appeals' rulings in the instant case and *Marchese, supra; Familias Unidas, supra;* and *Van Ooteghem, supra,* as well as the District Court ruling in *Overbay, supra,* are all analogous to this Court's seminal decisions in *Adickes v. S.H. Kress & Co,* 398 U.S. 144; 90 S. Ct. 1598; 26 L.Ed. 2d 142 (1970), and *Monell, supra,* where this Court held that both "official" enactments and "unofficial" decisions or other acts of policy-making bodies or supervisory officials of a municipality may constitute "customs, policies or practices" within the meaning of Section 1983. In *Adickes, supra; Monell, supra,* and their progeny, this Court looked to what the *actual practice* was in determining whether or not there was a "custom, policy or practice" within the meaning of Section 1983. By analogy, the Sixth Circuit in this case and in *Marchese, supra,* properly looked to the *practical relationship* between the county and the sheriff, not merely the sheriff's formal designation under state law, in determining that the Sheriff was the policy-maker for the County regarding law enforcement and the operation and maintenance of the Wayne County Jail. This Court succinctly articulated the policy behind such a holding in *Nashville, C. & St. L. R. Co. v. Browning,* 310 U.S. 362, 369; 60 S. Ct. 968; 84 L.Ed. 2d 1254 (1940) (per Frankfurter, J.):

> "It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books and to disregard the gloss which life has written upon it. *Settled state practice . . . can establish what is state law . . . Deeply embedded traditional ways of carrying out state policy . . . are often tougher and truer law than the dead words of the wriougher and truer law than the dead words of the written text.*" (emphasis added)

ase of *Kroes v. Smith*, 540 F.Supp. 1295 (E.D.Mich. 1982), as impliedly overruled by *Marchese, supra*. Therefore, the ixth Circuit Court of Appeals has *not* " . . . rendered a ecision in conflict with the decision of another federal ourt of appeals on the same matter . . .;" nor has it . . . decided a federal question in a way in conflict with pplicable decisions of this Court." Sup. Ct. R. 17.1(a) and c). Nor does the Court of Appeals' decision conflict with tate law. This Court should thus deny Petitioners' Petition or Writ Of Certiorari.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that this Honorable Court DENY the Petition For Writ Of Certiorari.

Respectfully submitted:

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Dated: September 24, 1986

OPINION

SUPREME COURT OF THE UNITED STATES

COUNTY OF WAYNE ET AL. *v.* TIMOTHY CARROLL

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 86–158. Decided October 20, 1986

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

This case presents the question of which state statute of limitations should be applied in a case brought under 42 U. S. C. § 1983 when more than one state statute arguably can be characterized as addressing "personal injury" claims. See *Wilson* v. *Garcia*, 471 U. S. 261 (1985). The lower courts continue to struggle with this question. In this case, for example, the Court of Appeals for the Sixth Circuit concluded that a three-year, catch-all statute should be applied which covers actions brought "to recover damages for the death of a person, or for injury to a person or property." Mich. Comp. Laws § 600.5805(8) (1979). The Sixth Circuit chose this section over other two-year sections which specifically cover intentional torts. See, e. g., Mich. Comp. Laws § 600.5805(2) (1979) ("The period of limitations is 2 years for an action charging assault, battery, or false imprisonment.") In so deciding, the Sixth Circuit has taken an approach directly contrary to its earlier decision in *Mulligan* v. *Hazard*, 777 F. 2d 340, 344 (1985), cert. denied, —— U. S. —— (1986).

I dissented from the denial of certiorari in *Mulligan* because of the split among the courts of appeals in dealing with this question, —— U. S. ——, and I dissent here because the confusion evidenced by this split is underscored by the Sixth Circuit's change in approach.